

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JANET JIMENEZ, *on behalf of*
herself and all others
similarly situated,

Plaintiff,

v.

CONCEPTS OF INDEPENDENCE, INC.,

Defendant.

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* Case No. 15-CV-05790 (FB)

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TRANSCRIPT OF CIVIL CAUSE FOR INITIAL CONFERENCE
BEFORE THE HONORABLE JAMES ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiff:

JEFFREY G. SMITH, ESQ.
ROBERT ABRAMS, ESQ.
CORREY ANN KAMIN, ESQ.
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For the Defendants:

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1 (Proceedings commenced at 10:06 a.m.)

2 THE CLERK: Civil cause for initial conference,
3 Jimenez versus Concepts of Independence, Inc., Case Number
4 15-Civil-5790.

5 Counsels, please state your name for the record,
6 beginning with plaintiff.

7 MR. SMITH: Jeff Smith, Your Honor, from Wolf
8 Haldenstein Adler Freeman & Herz.

9 THE COURT: Good morning.

10 MR. SMITH: Good morning.

11 MR. ABRAMS: Good morning, Your Honor. Robert
12 Abrams, also from Wolf Haldenstein.

13 THE COURT: Good morning.

14 MS. KAMIN: Good morning, Your Honor. Correy Kamin
15 from Wolf Haldenstein.

16 THE COURT: Good morning.

17 MR. FERNANDES: Hermes Fernandes from Bond,
18 Schoeneck & King on behalf of Concepts of Independence.

19 THE COURT: Good morning.

20 MR. PRAGER: David Prager, from Bond, Schoeneck &
21 King, also on behalf of Concepts of Independence.

22 THE COURT: Good morning. All right, folks.

23 So I've read the complaint. I've read the various
24 letters to me, including one, frankly, somewhat belatedly
25 filed, late yesterday, seeking a stay of discovery.

1 And going to ask plaintiff's counsel -- I don't know
2 who wants to speak for the plaintiffs, but -- plaintiff -- but
3 have you seen that motion?

4 (No audible response.)

5 THE COURT: You have? Okay. Good.

6 All right. So before we get to that issue, just
7 walk me through a little bit more factually the plaintiff's
8 work and the defendant's practices.

9 And, again, I don't know who wants to speak on
10 behalf of the plaintiff. But Mr. Jimenez -- is it Mr. or Ms?

11 MR. SMITH: Ms.

12 THE COURT: Ms. Okay.

13 MR. SMITH: Yes.

14 THE COURT: Ms. Jimenez worked for approximately
15 five weeks for the defendant?

16 MR. SMITH: Five. Or in my mind, I have six, but it
17 could be five, Your Honor.

18 THE COURT: Okay. Tell me about the hours and the
19 schedule, you know, the schedule of the wages rather.

20 MR. SMITH: She worked 24-hour shifts, sometimes as
21 many as five in a week is my understanding. She was paid for
22 12 hours of each 24-hour shift, which was and may still be
23 industry standard. But the rules have changed over the last
24 few years.

25 THE COURT: I know.

1 MR. SMITH: She was paid I -- Your Honor, I may be
2 corrected on this, but I believe she was paid about \$10 an
3 hour for the 12 hours --

4 THE COURT: How were the shifts --

5 MR. SMITH: -- which amounts to \$5 an hour for the
6 24.

7 THE COURT: Yeah. How were the shifts determined?
8 And also was it always for the same client or someone -- a
9 different person each time?

10 MR. SMITH: In this case, I believe for the five,
11 four or five or six weeks, she worked for the same client, but
12 I honestly am not sure, Your Honor.

13 THE COURT: Okay.

14 MR. SMITH: I think she worked for the same client.

15 THE COURT: Okay. And within the 24-hour shifts,
16 what direction did she have about when she was on call? You
17 know, what were the activities actually like --

18 MR. SMITH: She was --

19 THE COURT: -- because I know that could be an
20 issue?

21 MR. SMITH: She was to stay there for 24 hours and
22 render what -- working for 12 of them, and rendering whatever
23 assistance was necessary the other 12.

24 THE COURT: Did she --

25 MR. SMITH: She didn't --

1 THE COURT: -- did you get --

2 MR. SMITH: She was not a live-in, Your Honor. I
3 want to make that clear. She didn't --

4 THE COURT: Right.

5 MR. SMITH: She didn't live there. It was a 24-hour
6 shift.

7 THE COURT: Right. And during the 24 hours, did she
8 have a sleep period regularly?

9 MR. SMITH: I'm sure she slept. I haven't actually
10 asked her that question, but I'm sure slept part of the time.

11 THE COURT: Okay. Because I know that the amount of
12 time that she gets uninterrupted sleep is an issue under
13 the -- under the rule.

14 MR. SMITH: I don't know that it is an issue under
15 the state rule, Your Honor. I think it may be an issue under
16 the federal rule, but I don't believe it's an issue under the
17 state.

18 THE COURT: But you've asserted a federal claim,
19 right?

20 MR. SMITH: And we've also asserted state claims.

21 THE COURT: Okay. Is there some problem with me
22 asking the question about a rule that does apply to a claim
23 that you've -- that you've asserted?

24 MR. SMITH: Not at all. Not at all, Your Honor.

25 THE COURT: Okay. So you haven't asked the question

1 that is pertinent to one of the claims that you bring in this
2 court, correct?

3 MR. SMITH: I'm getting a little lost. I haven't
4 answered it? I didn't hear what you said.

5 THE COURT: I asked you a question about her sleep
6 schedule.

7 MR. SMITH: Yes.

8 THE COURT: And you said, oh, well, that's not an
9 issue and I haven't asked my client.

10 MR. SMITH: Well, I'm not saying it's not an issue,
11 Your Honor. I'm saying I don't know what her sleep schedule
12 was. I'm sure she slept part of that time.

13 THE COURT: Yeah. But you sort of brushed aside the
14 question saying it's not an issue only to have me establish,
15 after some back and forth, that it is an issue under one of
16 the claims you assert.

17 MR. SMITH: I apologize, Your Honor. I apologize.

18 THE COURT: I'm not offended. But I want --

19 MR. SMITH: I wasn't trying to brush you aside.

20 THE COURT: I'm trying to understand. It is an
21 issue under a claim you're asserting, but you didn't want to
22 find out from your client what the answer is.

23 MR. SMITH: I don't know the answer, Your Honor.

24 THE COURT: Do any of your colleagues know. Any --

25 MR. ABRAMS: Your Honor, as I understand it, the --

1 Ms. Jimenez, our client, was a woman who is 97 years old, has
2 serious problems both mental and physical, and as I understand
3 it she was always on call throughout the night, so that she
4 may have gotten some sleep, but that there was no regular
5 sleep at all. It just simply wouldn't have been possible.

6 For example -- and in the cases -- in this case for
7 example, with this particular consumer, she didn't even
8 recognize her son when he would come to visit her. She
9 wandered at night. She slept irregularly.

10 So it would appear that there was no block of time
11 that Ms. Jimenez could count on. And as I understand it, in
12 most of these cases, the consumers are individuals like this
13 one.

14 THE COURT: Try to stick to this case. Just get --

15 MR. ABRAMS: Okay.

16 THE COURT: -- to get may --

17 MR. ABRAMS: Sure.

18 THE COURT: -- get my legs underneath factually.
19 Okay.

20 What was the -- how was the -- how were the wages
21 paid? Cash, check, and by whom? Anyone?

22 MR. SMITH: Paid in check, Your Honor.

23 MS. KAMIN: They were paid by check from Concepts of
24 Independence.

25 THE COURT: From Concepts of Independence. Okay.

1 And was there a wage statement attached to it that reflected
2 hours, or how did -- how did that work?

3 MS. KAMIN: There was a brief statement, yes, of the
4 hours she worked, but it didn't reflect the complete 24 hour -
5 - hour period. It just reflected the hours she was paid for,
6 not necessarily the hours she worked.

7 THE COURT: Okay. And how are you defining the
8 hours she worked? Based on when she was present or some other
9 standard?

10 MS. KAMIN: Based on when she was present and on
11 call in the client's home.

12 THE COURT: Okay. All right. Why was Ms. Jimenez's
13 tenure so brief? Any understanding of that?

14 MR. ABRAMS: Your Honor, my under --

15 THE COURT: I don't think it matters. I'm just
16 curious.

17 MR. ABRAMS: My understanding was that she that she
18 was working an awful lot of hours for very little money.
19 That's my understanding.

20 THE COURT: What she doing now?

21 MR. ABRAMS: I'm not sure, Your Honor.

22 THE COURT: Okay.

23 MR. ABRAMS: I don't believe she's doing this kind
24 of work.

25 THE COURT: Okay. Yeah. I'm just -- there's a real

1 client here, right --

2 MR. ABRAMS: Yes.

3 THE COURT: -- that I take it you're trying to
4 represent?

5 MR. ABRAMS: Correct. That's correct, Your Honor.

6 THE COURT: All right. And Mr. Fernandes or Mr.
7 Prager, from your perspective, where's the factual
8 disagreement? I understand there's some legal issues that you
9 want to raise, but factually, what, if anything, is the
10 disagreement?

11 MR. FERNANDES: Your Honor, first if I could, I
12 apologize. It wasn't our intention to actually file the
13 motion. It was our intention that the letter would explain
14 the positions we were taking in the scheduling plan.

15 THE COURT: Oh, so you're not seeking a stay?

16 MR. FERNANDES: Well, I think in effect we are
17 because of what our position is.

18 THE COURT: I think so too.

19 MR. SMITH: Yes.

20 THE COURT: And I'd just as soon you not -- tell me
21 you're not doing something when you are. You're obviously
22 seeking a stay.

23 MR. FERNANDES: All right. We are, Your Honor. I
24 would have filed it as a proper motion, but we do want a stay,
25 yes. To be very clear, we do want a stay. And that's what

1 our position was in the -- in these papers.

2 THE COURT: And, you know, is there a difference
3 between asking for a stay and respectfully requesting that
4 discovery commence after the resolution of defendant's
5 intended motion to dismiss?

6 MR. FERNANDES: There's not.

7 THE COURT: Okay.

8 MR. FERNANDES: There's not. Okay.

9 THE COURT: All right. So, you know, less than --
10 less than a day before the planned conference, after you've
11 been supposed to confer on a jointly proposed schedule, that's
12 when you put in something that is in effect a motion but
13 you're not calling it that.

14 In the future, let's try and do things in a more
15 orderly way. Call things what they are and do it in a way so
16 that there's time to respond before we get to court. All
17 right.

18 MR. FERNANDES: Yes, Your Honor.

19 THE COURT: But let's see if we can address the
20 question that I was asking. Are there any factual areas of
21 disagreement?

22 MR. FERNANDES: At this point, there are factual
23 areas of disagreement. They may be different than Your Honor
24 was asking about. Some of the issues we simply don't know
25 about and let me explain why.

1 Concepts of Independence operates as a fiscal
2 intermediary. That's --

3 THE COURT: You told me that. Look, come on. I'm
4 such a simple guy that I get lost when I ask a question and a
5 lawyer starts answering a different one. Then I don't -- I
6 don't follow the answers to either one.

7 MR. FERNANDES: Okay.

8 THE COURT: So let's start with the question I
9 asked.

10 MR. FERNANDES: All right. There are factual --

11 THE COURT: Yeah. What --

12 MR. FERNANDES: Yes, there are factual disputes.
13 The first dispute goes to the nature of Concepts of
14 Independence. Concepts of Independence doesn't do -- Your
15 Honor, I'm sorry, but I have to explain this. Concepts of
16 Independence --

17 THE COURT: You don't have to, but you're going to,
18 so -- and I can't stop you so say what you're going to say.
19 Go ahead.

20 MR. FERNANDES: Concepts of Independence doesn't do
21 the scheduling. Concepts of Independence doesn't do the
22 hiring. Concepts of Independence doesn't have a role in terms
23 of what services Ms. Jimenez provided as a personal assistant.

24 So we write -- today we don't know -- apart from the
25 time she -- that Ms. Jimenez submitted, we don't know what

1 services she provided during the scheduled -- during her
2 scheduled hours.

3 THE COURT: You cut the checks to her, yes?

4 MR. FERNANDES: Yeah. That's right.

5 THE COURT: So how do you determine what amount to
6 put on the check?

7 MR. FERNANDES: The amount is determined in this
8 case by the fact that -- what was authorized by either the City
9 of New York or by a managed care provider - I'm not sure
10 which did it in this circumstance. I believe it was the
11 managed care provider authorized live-in services for Ms.
12 Jimenez [sic]. And since she was -- since she was receiving
13 live-in services, Ms. Jimenez would have been paid according
14 to the live-in standard that's set with the contract with the
15 managed care provider.

16 THE COURT: You're paying the worker as opposed to
17 the client?

18 MR. FERNANDES: That's right.

19 THE COURT: Ms. Jimenez was authorized to receive
20 something?

21 MR. FERNANDES: Ms. Jimenez was authorized. She was
22 a Medicaid beneficiary. She was eligible --

23 THE COURT: Ms. Jimenez?

24 MR. FERNANDES: I'm sorry. Ms. Isquith. Yes. I'm
25 sorry. Ms. Isquith.

1 THE COURT: The client.

2 MR. FERNANDES: Isquith, yes. No, not the client.
3 Ms. Isquith was -- I'm sorry. Ms. Isquith was authorized to
4 receive services.

5 THE COURT: Ms. Isquith is the client, not the
6 plaintiff, right?

7 MR. FERNANDES: Yeah. The consumer we call them,
8 yes. I'm sorry.

9 THE COURT: Okay. The consumer if that's what you
10 want to call it?

11 MR. FERNANDES: Yes.

12 THE COURT: Okay.

13 MR. FERNANDES: So Ms. Isquith was authorized to
14 receive services.

15 THE COURT: Right. So how does that determine what
16 you pay Ms. Jimenez? Because maybe she didn't provide any
17 services to Ms. Isquith. How do you determine what to pay the
18 person providing the service?

19 MR. FERNANDES: Because in this case Ms. Isquith was
20 authorized by the entity that authorizes home -- consumer
21 directed services for live-in services. And by virtue of
22 that, when Ms. Isquith's personal assistant presents a time
23 sheet that says I worked these shifts, and her time sheet
24 showed she worked 24-hour shifts, she then was paid the live-
25 in rate.

1 THE COURT: Right. So the relationship is not with
2 the consumer, right? Who selects Ms. Jimenez?

3 MR. FERNANDES: Actually in this case, I -- actually
4 in this case, my understanding is that Ms. Isquith lacked
5 capacity --

6 THE COURT: It sounds like that.

7 MR. FERNANDES: -- to direct her own care.

8 In that case, the regulations require that she have
9 an individual designated as a personal representative, which
10 my understanding is that she did, and that was a relative of
11 hers. So that designated representative selected --

12 THE COURT: But how do you get involved? The
13 representative goes out and finds Ms. Jimenez?

14 MR. FERNANDES: Yes.

15 THE COURT: And Ms. Jimenez does the work?

16 MR. FERNANDES: That's right.

17 So how Concepts gets involved is, once the
18 individual is designated as eligible for consumer directIVE --
19 and in this case, the personal representative says I want my
20 relative to receive consumer directed services -- they then
21 have a choice of fiscal intermediaries.

22 In this chase, they -- in this case, they chose
23 Concepts of Independence to be their fiscal intermediary. And
24 as fiscal intermediary, Concepts handles payment, looks to see
25 that the person only submits hours for which they're

1 authorized, submits them on the basis of those payroll
2 records, submits to the state Medicaid program for payment.

3 THE COURT: And you have no role in selecting who
4 performs these services?

5 MR. FERNANDES: None.

6 THE COURT: None.

7 MR. FERNANDES: The --

8 THE COURT: Or the hours?

9 MR. FERNANDES: Or the hours.

10 THE COURT: All right. Is there disagreement on
11 that on the plaintiff's side?

12 MR. SMITH: There is, Your Honor. I think that they
13 have to qualify the person even though it's consumer directed.

14 THE COURT: Uh-huh.

15 MR. SMITH: They do have to qualify the person.
16 They can't just pay to grandma for instance.

17 THE COURT: Okay.

18 MR. SMITH: And --

19 THE COURT: Who's setting the hours?

20 MR. SMITH: I do not know the answer to that, Your
21 Honor.

22 THE COURT: Does anybody on the plaintiff's side
23 know that?

24 MR. ABRAMS: The hours -- the hours, Your Honor, are
25 approved --

1 THE COURT: Yes. But somebody has to figure out --

2 MR. ABRAMS: -- and then the question of how to pay
3 the persons --

4 THE COURT: Look, Ms. Jimenez didn't come up with
5 the idea of spending 24 hours on certain days and not coming
6 at all on others?

7 MR. ABRAMS: No.

8 THE COURT: Somebody did.

9 MR. ABRAMS: She was just assigned to that by them.

10 THE COURT: You're saying it was assigned?

11 MR. ABRAMS: That's my understanding.

12 MS. KAMIN: Your Honor, I believe Ms. Jimenez and
13 her client's son in this case agreed upon the hours together.

14 THE COURT: So did the defendant have any role in
15 that?

16 MS. KAMIN: I don't believe so.

17 THE COURT: Okay. Now look, it's one thing to have
18 discovery as between the parties, but right now I've got two
19 different lawyers for the plaintiff telling me factually two
20 different things. And I don't anticipate we're going to have
21 discovery as between the two plaintiff's counsel.

22 Can somebody tell me which of the two things I've
23 just heard is the plaintiff's position?

24 MS. KAMIN: From speaking to our client, I believe
25 that her hours were set by agreement with her client.

1 THE COURT: Okay. Is there any employment agreement
2 here?

3 MS. KAMIN: There is what seems to be kind of an
4 informal agreement. It's called A Managed Care Enrollment
5 Memo that was provided by Concepts to Ms. Jimenez when she
6 started working for them.

7 THE COURT: Do you happen to have it?

8 MS. KAMIN: I don't believe I do, Your Honor.

9 THE COURT: Do you?

10 MR. FERNANDEZ: I did not bring that with us. But
11 she's right, that that is provided. That's provided to the
12 consumer and it's provided to the personal assistant.

13 THE COURT: How does -- how does Concept get its
14 cut? In other words, it's making some money out of this. How
15 does it do that?

16 MR. FERNANDES: Yes. Concepts does this in one of
17 two ways. It is a not-for-profit, but it either has a
18 contract directly if it's in the City of New York with the
19 Human Resources Administration or it now has a -- or it has
20 contracts now with what are called managed long-term care
21 entities who are now stepping into the role that HRA formerly
22 provided.

23 And so now with the managed long-term care entities,
24 they have to negotiate a rate which is actually the managed
25 long-term care entities say this is the rate we'll pay and

1 Concepts either says yes or no.

2 THE COURT: And does Concepts get something beyond
3 that rate -- not beyond that --

4 MR. FERNANDES: That's it. That's it.

5 THE COURT: So you get -- you get money from HRA in
6 a city case?

7 MR. FERNANDES: They're all city cases, but now the
8 managed care entities are coming in. So let's just say for
9 sake of argument \$18 an hour may be what is paid by the
10 managed care entity. And the numbers will be around that.
11 Depends on which entity. So \$18 an hour. From that, Concepts
12 has to pay for its administrative expenses.

13 THE COURT: What do you administer? I mean, you
14 know, this is I'm --

15 MR. FERNANDES: Sure.

16 THE COURT: -- I'm trying to understand, if you're
17 not an employer, what you're doing that gets you the
18 difference between the 18 you get from whoever --

19 MR. FERNANDES: Right.

20 THE COURT: -- and the -- it sounds like 10 you're
21 paying to Jimenez.

22 MR. FERNANDES: Well, actually in this case -- I
23 stopped too soon -- because in this case, what they get is a
24 flat amount on the live-in rate as well. So they get --
25 they'll get a rate that says 18 times 13 and that's what they

1 get. So --

2 THE COURT: All right. But it breaks down --

3 MR. FERNANDES: Right. So here's what they get.

4 THE COURT: -- in theory to an hourly rate that is
5 80 percent greater than what you're paying out to the worker.
6 What is Concepts doing for that that doesn't make it an
7 employer?

8 MR. FERNANDES: Sure. What Concepts does is it acts
9 in two different ways. It acts as the interaction with the
10 Medicaid program. So it receives the enrollment of the
11 individual or the beneficiary says I want the consumer
12 directed services. Concepts has to essentially explain the
13 program to the consumer participants or their designated
14 representative.

15 There are by regulation certain -- very, very few
16 standards, but certain standards that the personal assistant
17 has to meet. A personal assistant can't be a spouse. A
18 personal assistant can't be on the Medicaid exclusion list. A
19 personal assistant has to have a health assessment and have
20 received and proved that they have had measles or they've had
21 measles inoculations and things like that.

22 And then after that, what they do is they receive
23 from the consumers the time sheets that have been provided by
24 the -- by the consumer, their personal assistant, showing what
25 hours they worked. They have to check those to be sure that

1 there is some indicia of authenticity.

2 They check those against the authorized hours. They
3 submit those to the managed care entity or to the Medicaid
4 program directly for payment. That turns around.

5 They also -- besides the dollar amount of the
6 earnings for the consumers, there's also benefits as well.
7 The gap is not 60 percent. It's much, much smaller. This
8 program's become very popular because it's less expensive than
9 regular personal care services.

10 THE COURT: Are any taxes or benefits withheld from
11 the paycheck?

12 MR. FERNANDES: Yes. They're responsible for doing
13 those things. So they handle all the withholding issues, pay,
14 benefits, Workers Comp, those types of things.

15 THE COURT: Okay. And let me just ask the
16 plaintiff's counsel again -- whoever knows this just weigh in
17 -- in terms of hiring and firing, is there any dispute that
18 the -- well, you've already told me that the client, the
19 consumer's representative selected Ms. Jimenez.

20 To whom was Ms. Jimenez's resignation communicated?
21 To whom was the resignation communicated? In other words,
22 when Ms. Jimenez decided she no longer wanted to do it, to
23 whom did she give notice?

24 MS. KAMIN: I have not asked her about that
25 directly, but I would assume she gave notice to both Concepts

1 of Independence and to the client for whom she worked.

2 THE COURT: And in terms of setting the hours, who
3 did that? That was -- those --

4 MS. KAMIN: She set them by agreement with her
5 client.

6 THE COURT: With the client. Okay. So what did
7 Concepts do that satisfies the economic reality test of an
8 employer?

9 MR. SMITH: Your Honor, as counsel just said, they
10 screen her for the job to make sure she's qualified.

11 THE COURT: But they don't have hiring and firing
12 authority, right? They can neither hire her against the
13 client's wishes nor fire her against the client's wishes?

14 MR. SMITH: I don't know the answer to that, Your
15 Honor. I believe it's shared.

16 If she was doing something, for instance, that was a
17 violation of the Medicaid rules --

18 THE COURT: Of course.

19 MR. SMITH: -- they can --

20 THE COURT: If they're --

21 MR. SMITH: -- they can fire --

22 THE COURT: If she's ineligible, she can't get paid
23 for doing this. But --

24 MR. SMITH: Or if she's doing something in leaving
25 in the middle of the night for instance, they could fire her

1 if they found that out. So I believe it's shared, but --

2 THE COURT: You disagree with that?

3 MR. FERNANDEZ: We cannot. No authority whatsoever.

4 THE COURT: What's your basis for saying that?

5 MR. SMITH: My basis for saying that is my general
6 knowledge of the field. I have a relative who works in the
7 field.

8 THE COURT: All right. Do you have any --

9 MR. SMITH: And surprise and --

10 THE COURT: -- information based on the facts of
11 this case?

12 MR. SMITH: I don't. I haven't seen --

13 THE COURT: And if -- because if you're doing this,
14 it sounds --

15 MR. SMITH: I haven't seen the contract yet.

16 THE COURT: It does sound -- it's -- you're Mr. --

17 MR. SMITH: Smith.

18 THE COURT: Smith. It sounds like if you're saying
19 I know this based on things I've heard from other people who
20 weren't parties to the case, that sounds more like a witness.
21 And if you want to be a witness, that's fine, but.

22 MR. SMITH: Fair enough. Fair enough, Your Honor.
23 I don't know it from documents.

24 THE COURT: I just want to know if there's any facts
25 based on information in this case.

1 MR. SMITH: I don't have documents on it, no.

2 THE COURT: Or statements from the client?

3 MR. SMITH: I do not have a statement from the
4 client on it.

5 THE COURT: Okay. All right. All right. Well,
6 look, it helps me get oriented in the case. I don't know --
7 and we're clearly not trying the case or resolving the motion
8 to dismiss here.

9 Let's talk about discovery and the issue of the
10 stay. I've read the defendant's letter, as I know you guys
11 have on the plaintiff's side.

12 It sounds like there are a number of issues here
13 that are going to be clarified by the motion practice that may
14 well have a very large impact on how discovery proceeds. Why
15 isn't it in everybody's interest to have a stay?

16 MR. SMITH: Your Honor, many of the things that will
17 be argued on the motion to dismiss and in our motion for class
18 -- not class certification -- collective certification we need
19 some discovery on. We need to get some discovery from them,
20 for instance, to find out about this hiring and firing
21 authority. We need to see what their agreement with Ms.
22 Jimenez is. And we need to see what their agreement with our
23 client is. I don't have a copy of that.

24 THE COURT: But don't you have an obligation to --

25 MR. SMITH: We need to see what their agreements are

1 with the state --

2 THE COURT: Well, what the --

3 MR. SMITH: -- entities that pay them.

4 THE COURT: But this is -- this is a motion that
5 tests the allegations.

6 MR. SMITH: Yes.

7 THE COURT: And allegations aren't going to be based
8 on here's what I think may apply in this case based on what a
9 relative who works in the field tells me.

10 It has to be based on what your client tells you and
11 that you've, you know, alleged in good faith based on that.

12 And, you know, if we take out what you understand
13 based on what you've heard from a relative in the field, I'm
14 not sure that you've necessarily alleged something that
15 discloses an employment relationship.

16 MR. SMITH: I disagree, Your Honor. I think we
17 have.

18 THE COURT: Yeah.

19 MR. SMITH: We have alleged sufficient facts about
20 the employment, about who paid. He's just said some of that.

21 THE COURT: Yeah.

22 MR. SMITH: About who pays. About what they have to
23 do before they can reach that stage.

24 THE COURT: Okay.

25 MR. SMITH: I believe we have alleged sufficient

1 evidence here --

2 THE COURT: Oh, okay. So you're going to prevail on
3 the motion to desist?

4 MR. SMITH: -- to make a serious question.

5 THE COURT: Yeah.

6 MR. SMITH: And I think we prevail.

7 THE COURT: Okay.

8 MR. SMITH: So I don't think we're at a stage
9 here --

10 THE COURT: So you don't need discovery. You don't
11 need discovery to litigate the motion to dismiss?

12 MR. SMITH: We don't need discovery for that. I
13 don't think we need discovery to show that their motion to
14 dismiss is not the slam-dunk that they think it is.

15 THE COURT: Right. Okay.

16 MR. SMITH: I think that their motion -- and since
17 their motion to dismiss is not a slam-dunk, I think discovery
18 should go ahead.

19 THE COURT: Yeah.

20 MR. SMITH: There are areas that we want discovery
21 on. They're fairly discreet. But there are areas in our
22 first wave of discovery that we want to take discovery on.

23 THE COURT: Well, what -- what discovery is directed
24 purely to the motion to dismiss?

25 MR. SMITH: I don't know that any of it's directed

1 purely to the motion to dismiss, Your Honor. It's directed
2 towards the claims in the case.

3 THE COURT: What --

4 MR. SMITH: I don't think the claims in the case,
5 and particularly the state claims which they haven't even
6 really challenged, I don't believe -- there they have a cake
7 and eat it too kind of a thing where they say they're not an
8 employer, but yet they've qualified for an employer's
9 exemption in the state which I don't think they have.

10 THE COURT: Okay.

11 MR. SMITH: And I think that those are fair grounds
12 for us to start discovery on now rather than wait.

13 THE COURT: Okay. Look, my usual take on motions to
14 stay discovery pending a dismissal motion is that there's
15 almost always something that can and should go forward pending
16 a motion to dismiss because there's some dispute that's going
17 to be played out in this court most likely. You know, motions
18 to dismiss are rarely successful.

19 But it strikes me that there are here some really
20 significant threshold issues that may shape discovery and
21 that's going to be a lot more efficient to await the outcome
22 of a motion to dismiss, and not prejudicial to Ms. Jimenez.

23 So I'm going to grant the motion with this caveat.
24 To the extent that there are very targeted discovery requests
25 going to the nature of the employment relationship that's

1 alleged here -- in other words, is there, you know, a contract
2 between Jimenez and Concepts, something about, you know, was
3 there anything that sets -- that Concepts does to set the
4 schedule or the conditions of employment, I think that's fair
5 game and I think it will --

6 MR. SMITH: Your Honor, I would ask that you
7 consider also in that the contracts they had with the consumer
8 here and the contracts they have with the agencies --

9 THE COURT: I'm not going to prescribe everything.
10 I'm going to ask you to confer about very, and I mean very,
11 limited discovery as to the employment relationship between
12 Jimenez and Concepts.

13 But I will tell you, Mr. Smith, based on what I've
14 heard today, I think there's a very good reason to hold off
15 anything that's particularly burdensome until we have a much
16 better idea based on the motion practice where this case is
17 going.

18 So my sole goal here is to allow the limited
19 discovery, if any -- and I want to emphasize this because it
20 is a motion to dismiss based on the pleadings -- if any, that
21 you guys need to fairly litigate a dismissal motion.

22 Now you've told me you're prepared to litigate it
23 without discovery so maybe that there's nothing. But I don't
24 want to shut off -- shut off entirely without having you guys
25 sit down and talk about something that you might be able to

1 work out consensually about, you know, very basic pieces of
2 information about the case like, you know, an employment
3 contract, anything that sets schedules and so on.

4 But I leave that to you guys to work out in the
5 first instance. And if there's a dispute, you bring that to
6 me.

7 In light of that decision, I'm not going to schedule
8 a further appearance before me and I'll wait to see what
9 happens with Judge Block and the resolution of the motions.

10 All right. Anything else for today, folks?

11 MR. FERNANDES: Thank you.

12 THE COURT: Okay. Thank you very much. Have a good
13 day.

14 (Proceedings concluded at 10:35 a.m.)

15 I, CHRISTINE FIORE, Certified Electronic Reporter and
16 Transcriber, certify that the foregoing is a correct
17 transcript from the official electronic sound recording of the
18 proceedings in the above-entitled matter.

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21 _____ September 18, 2017

22 Christine Fiore, CERT-410
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